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IN THE

Supreme Court of the United States

October Term, 1953

No. 680

JACK H. STACY,

Petitioner,

vs.

DAVID GREENBERG and CHARLES MELTZER,

Respondents.

ALVIN WOLFF,

Petitioner,

vs.

DAVID GREENBERG and CHARLES MELTZER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Jack H. Stacy and Alvin Wolff respectfully pray for a writ of certiorari to review a judgment of the Supreme Court of New Jersey, entered January 11, 1954.

Opinions Below.

The opinions of the Supreme Court of New Jersey are reported in 9 N. J. 390 and 14 N. J. 262. A petition for rehearing was duly made and denied.

Summary Statement.

Petitioners suffered personal injuries in the State of New Jersey while passengers in an automobile driven by respondent Greenberg and owned by respondent Meltzer.

Petitioners were employed by Marlene Blouse Corp., a New York corporation, as was respondent Greenberg. Respondent Meltzer was president of Marlene Blouse Corp. All of the parties are citizens of the State of New York.

At the time of the accident the petitioners and Greenberg were returning to New York from a business trip in Pennsylvania. The automobile was the personal property of Meltzer, occasionally used on business trips by him, for his convenience.

Action was brought by petitioners as plaintiffs in New Jersey for damages for personal injuries based on the tort. As a second separate defense in that action, respondents, defendants therein, asserted that Section 29(6) of the New York Workmen's Compensation Law barred the action. That section provides:

> The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of his death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ.

A motion was made by petitioners to strike that portion of the answer, and a cross motion by respondents for sum-

mary judgment. The lower court granted petitioners' motion and respondents appealed to the Supreme Court of New Jersey on the sole ground that the full faith and credit clause of the Constitution of the United States required New Jersey to give effect to the New York statute.

The New Jersey Supreme Court reversed, 9 N. J. 390 on a different ground, stating that as a matter of "comity" New Jersey would apply New York law. The court held, however, that even under New York law there remained to be tried the question of whether respondents were "in the same employ" in the situation presented.

The case proceeded to trial and a judgment was entered for petitioners, based on the finding of fact that the respondents were not fellow employees for the purpose of the trip to New York. Again an appeal was taken, first to an appellate court which affirmed, and then to the Supreme Court of New Jersey, which reversed, holding that respondents were "in the same employ" within the meaning of Section 29 (6). *Stacy* v. *Greenberg*, 14 N. J. 262.

Basis for Jurisdiction.

This petition is brought under Section 1257 of Title 28 of the United States Code. The mandate of the Supreme Court of New Jersey has denied petitioners the due process and equal protection of law guaranteed by Section 1, 14th Amendment of the Constitution of the United States, has abridged the privileges and immunities guaranteed them by Article IV, Section 2, of the Constitution of the United States and failed to give full faith and credit to the law of New York as required by Article IV, Section 1 of the Constitution of the United States.

The constitutional questions herein cited were brought to the attention of the Supreme Court of New Jersey in

a petition for a rehearing of its decision. This petition was denied without opinion. It was not possible to raise these questions earlier because the sole issue raised by respondents (appellants below) was full faith and credit. The decision of the court based on comity was unanticipated. Under such circumstances, appellants' raising of the constitutional questions herein are timely. *Herndon* v. *Georgia,* 295 U. S. 441; *Missouri ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313; *Brinkirhoff-Fairs* v. *Hill,* 281 U. S. 673.

Questions Presented.

Does the refusal of the New Jersey Court to entertain petitioners' action, which action is valid under New Jersey law, on the ground that it is barred by a New York statute, constitute:

1. a deprivation of petitioners' rights without due process of law;
2. a denial of the equal protection of the laws;
3. an abridgment of the privileges and immunities of citizens of the several states;
4. failure to give full faith and credit to the law of the State of New York in violation of the Constitution of the United States?

Reasons for Allowing Writ.

I.

New Jersey has refused to entertain suit on a valid New Jersey cause of action because petitioners were New York residents and employees of a New York corporation.

This refusal is in derogation of the Constitution and irrevocably and unjustifiably deprives petitioners of their rights.

II.

The decision of the New Jersey Supreme Court cannot be reconciled with the previous decisions of this Court, including *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, and *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U. S. 493. The *Bradford* case, *supra*, relied upon by respondents, cannot be controlling herein when the severe limitations imposed upon its doctrine by the decision in the *Pacific Employers* case, *supra*, is applied. Indeed, the rule applied in the *Pacific Employers* case is conclusive and determinative with regard to the rights of the petitioners herein and the decision of the New Jersey Supreme Court must therefore be set aside.

III.

The instant case raises important issues in connection with the rights of transients, injured as the result of torts, to recover damages in actions at law. In view of the vast amount of traveling required of persons engaged in business activities in our modern economic society, these issues should be finally resolved.

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PETITIONERS' BRIEF.

I.

New Jersey, by refusing to apply New Jersey Law to petitioners' causes of action, has violated petitioners' rights under the Constitution of the United States, Article IV, Section 2.

Article IV, Section 2 of the Constitution of the United States provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several states.

This clause prohibits any state from discriminating against citizens of another state with respect to fundamental and basic privileges of citizenship. One of the privileges protected is the "right to institute and maintain actions of any kind in the courts of the state." *Corfield* v. *Coryell*, 4 Wash., U. S. 371, 3 Fed. Case #3230; *Slaughterhouse Cases*, 16 Wall. 37; *Chambers* v. *Baltimore and Ohio R. R. Co.*, 207 U. S. 142.

Under this long established and well recognized rule, if New Jersey has denied petitioners the right to recover in the instant case because petitioners are New York citizens, or insured by virtue of their employment in New York, then the judgment of the New Jersey court must be reversed.

Unquestionably, in the absence of the application of Section 29(6) of the New York Workmen's Compensation Law, petitioners' cause of action would have been recognized in New Jersey, as was fully established at the trial. The Supreme Court of New Jersey, however, applied Section 29 (6) upon what is called "well established rules of comity". By "comity", the court is clearly referring to a conflict of laws doctrine. Yet, the instant case is an action brought in New Jersey to recover for personal injuries suffered in New Jersey. There is no conflict of laws issue requiring resolution by the rules of comity. The sole possible rational for interjecting a conflict of laws doctrine in the instant matter is that transients, injured in New Jersey, must be examined to determine if the law of their state of residence permits an action for damages. Only after an affirmative determination will New Jersey

allow recovery. Such discriminatory treatment is prohibited by the Constitution of the United States.

New Jersey has justified its decision on the ground that New Jersey has insufficient interest in the event because,

> "their contact with our state was purely casual and not in the performance of their employment contracts within the reach of our decisions which imply our statute into a foreign contract of hiring to be performed in this state" 9 N. J. 390, at 397.

By the well established rules which the New Jersey courts purported to be following, the state where a tort occurs is the only state with an interest, and it is the law of that state which should govern, no matter which forum sits in judgment. Thus, not only was there a violation of petitioners' constitutional rights by applying rules of comity, but such rules were incorrectly applied. It should be noted in passing that New York undoubtedly would have permitted recovery had this action been brought there. Under the doctrine of *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, New York will apply the law of the state where the tort was committed.

As is said in 15 *C. J. S.* at p. 897:

> "* * * It is thoroughly established as a general rule that the lex loci delicti, or the law of the place where the tort or wrong has been committed, is the law that governs and is to be applied with respect to the substantive phases or torts or the actions therefor, and determines the question of whether or not an act or omission gives rise to a right of action or civil liability for tort, even if statutory, and this law includes the effect of such asserted matters of defense as go to qualify the right or duty."

The theory, relied upon by New Jersey, that the New York Workmen's Compensation Law becomes a part of every New York employment contract, was adopted in one case in order to extend the remedial benefits of the compensation law where otherwise there could have been no recovery for injuries. (*Post* v. *Burger & Gohlke*, 210 N. Y. 544). The "contract" rationale was later abandoned in a decision by Judge Cardozo in *Smith* v. *Heine Safety Boiler Co.*, 224 N. Y. 9, and the contract theory has since been repeatedly and invariably rejected in cases such as *Cameron* v. *Ellis Construction Co.*, 252 N. Y. 394; *Barnhart* v. *American Concrete Steel Co.*, 227 N. Y. 531; *Schmidt* v. *Wolf Contracting Co.*, 269 App. Div. 201, 55 N. Y. S. 2d 162, App. Den., 269 App. Div. 870; 57 N. Y. S. 2d 261.

The New Jersey Workmen's Compensation Law, on the other hand, by the terms of the statute, sets up a contractual relationship. But in order to protect its own citizens employed outside of the state, New Jersey has adopted a fiction to permit recovery.

In *American Radiator Co.* v. *Rogge*, 86 N. J. L. 436, aff'd., 87 N. J. L. 314, plaintiff was a New Jersey citizen employed by a New York concern, but doing a portion of his work in New Jersey. He was injured in New Jersey and sought recovery under the New Jersey Workmen's Compensation Law. New Jersey permitted recovery on a theory of quasi-contract: that is, a New Jersey contract of compensation insurance was implied by this statute from an ordinary New York contract of employment. Such an extension of the benefits of legislation by use of a legal fiction is not questioned. But New Jersey cannot, on the one hand, extend the benefits of its laws to its own citizens and deny the benefits, on the other hand, to non-citizens in similar situations. To do so, as in the case at bar, is to discriminate against the non-citizen in violation of Article IV, Section 2, of the Constitution of the United States.

II.

The refusal of the New Jersey Court to permit recovery on petitioners' causes of action constitutes a deprivation of property without due process of law.

Amendment 14, Section 1 of the Constitution of the United States, provides: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Petitioners commenced actions valid under the laws of New Jersey. Unquestionably, a cause of action constitutes property, and the arbitrary refusal of a court to permit recovery upon a valid cause of action constitutes a deprivation of property without due process.

Under the law of New Jersey, an employee may sue a coemployee for negligence, and the existence of a compensation right against the employer does not deprive him of his common law right. *Churchill* v. *Stephens*, 91 N. J. L. 195; *Stacy* v. *Greenberg*, 9 N. J. 390. That is not only New Jersey's public policy as a matter of common law, but it is reinforced by New Jersey's compensation law. See *United States Casualty Co.* v. *Hercules Powder Co.*, 4 N. J. 157.

Doctrinally, there is no difference or distinction between a state arbitrarily applying its own law where inapplicable (*Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143; *Home Insurance Co.* v. *Dick*, 281 U. S. 397), and a state arbitrarily applying an inapplicable foreign law (the case at bar).

That the decision of the New Jersey Court was arbitrary and erroneous is evident. As was developed in Point I, *supra*, New Jersey has insisted upon using a discarded

New York contract theory of Workmen's Compensation in order to defeat a common law tort action having no connection whatsoever with New York contract law.

The only conceivable basis for the New Jersey Court's reliance upon "comity" as a rationale for applying New York law herein, lies in the concurring opinion of Mr. Justice Stone in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145. In that case, plaintiff's decedent, a resident of Vermont, was employed in Vermont to perform services both in Vermont and New Hampshire. He was killed in New Hampshire, and a wrongful death action against the employer was begun in the Federal District Court in New Hampshire. The Vermont Workmen's Compensation Law precluded such an action. Mr. Justice Brandeis, for the majority, held that the public policy of New Hampshire did not prohibit the honoring of the defense of the Vermont statute, and that a substituted right against the employer existed under the Vermont statute. Therefore, the full faith and credit clause required that recovery in the civil action be denied. Mr. Justice Stone, in a separate opinion, stated that the majority had made an unwarranted extension of the doctrine of full faith and credit, but that the same result should be reached on grounds of comity.

In a later case, *Pacific Employers Insurance Co.* v. *Industrial Accident Commission*, 306 U. S. 493, the full faith and credit rationale was overruled, or at least severely limited. If, in the instant case, the decision of the New Jersey Supreme Court is allowed to stand, the rejected rule of the *Bradford* case will govern. That would be a result not permitted by the due process clause of the 14th Amendment. It must be noted that one of the vital elements of the *Bradford* case is missing here. There the action was against the *employer* only, against whom a substituted right existed under the Compensation Law. Here, the action is against a *fellow employee*, and there is no

substituted right under the New York statute. While New York may enact legislation abolishing a local cause of action, New York certainly did not intend, nor did it have the power, to enact legislation abolishing completely a New Jersey common law cause of action.

Indeed, the State of New York has itself discarded the theory of extra-territoriality of its Workmen's Compensation Law.

In *Travelers Ins. Co.* v. *Central R. Co. of New Jersey*, 143 Misc. 589, 258 N. Y. S. 35 the employee was employed by Loft, Inc., in New York and was killed while in the course of his employment in New Jersey by reason of the negligence of the defendant railroad. The railroad settled with the deceased's representative in an amount in excess of the compensation value of the loss sustained by the employee's widow. Thereafter, in accordance with a provision of the compensation law applicable in those circumstances, an award of $1,000 was made to an agency of the State. The compensation carrier paid this amount and claimed that under sub-section 5 of section 29 it was entitled to sue the railroad. The court held that sub-section 5 of section 29 had no extraterritorial effect and distinguished the situation from cases involving the rights of an employee against his employer. The Court pointed out that as to the liability of third parties, the claim is purely *ex delicto* and is governed by the law of the place where the accident arose and not by the New York law. At page 37 the Court said:

> "By the provisions of the Workmen's Compensation Law, an independent cause of action is thus created against the tort-feasor. * * * The accident here occurred in the state of New Jersey. The law seems well grounded that an act of the Legislature will ordinarily be deemed to apply only within the

boundaries of the state. *Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544, 548, 111 N. E. 351. * * *."

To the same effect is *Royal Indemnity Co.* v. *Atcheson, T. & S. F. Ry. Co.*, 272 App. Div. 246, 70 N. Y. S. (2d) 697, aff'd 297 N. Y. 619, 75 N. E. (2d) 631, where the Court stated at page 701:

> "As we have seen, the statutory cause of action for wrongful death has no extraterritorial application. It, therefore, necessarily follows that the additional liability, created by Section 29 for the same negligent conduct, is limited to torts committed within this state. * * *"

The Courts of the State of New York have never held that a coemployee, injured in another State, could not recover from the other even though he is entitled to compensation under the Workmen's Compensation Law.

Accordingly, it is submitted that respondents cannot establish an essential premise of their position, to wit: that the New York statute was intended to apply, so far as the liability of third persons is concerned, to an accident which occurs outside of New York and to preclude the state where the accident happened from enforcing its own laws.

III.

New Jersey, in refusing to recognize petitioners' causes of action, has denied them equal protection of the laws.

Amendment 14, Section 1, of the Constitution of the United States provides that no state shall "* * * deny to any person within its jurisdiction the equal protection of the laws."

This clause prohibits discrimination against any class of persons if such classification is unreasonable. That there has been discrimination against petitioners is undeniable, since it has been conceded by respondents that a New Jersey resident could recover in a situation analogous to the one here presented. Petitioners were denied access to the New Jersey courts because they were New York citizens and perhaps further because

> "* * * their contact with our state was purely casual and not in the performance of their employment contracts within the reach of our decisions which imply our statute into a foreign contract of hiring to be performed in this state" 9 N. J. 390 at 397.

New Jersey is thus saying that, in order to recover on a common law cause of action in this situation, a claimant must be covered by the New Jersey Workmen's Compensation Law. This is indeed a novel classification of parties. New Jersey has attempted to divest itself of all interest in persons whose foreign employment requires them to cross her territory.

The relationship of an individual who has suffered personal injuries as the result of a tort, to the state where the tort was committed, is far from "purely casual". It is the only relationship which the law recognizes in an action on the tort. To deny petitioners recovery on this ground is to exclude from the protection of New Jersey law those who are in the state as transients. This result the equal protection clause will not permit.

> *Hague* v. *C.I.O.*, 307 U. S. 496, 511;
> *Toomer* v. *Witsell*, 334 U. S. 385, 395.

IV.

New Jersey in failing to give full faith and credit to the New York Law of Torts has violated the United States Constitution.

Article IV, Section 1 of the Constitution of the United States provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Full Faith and Credit Clause parallels the international law of comity. *Compagnie du Port de Rio de Janeiro* v. *Mead Morrison Mfg. Co.*, 19 F. 2d 163. Its purpose was to make mandatory principles which otherwise would be free of constitutional compulsion. *Broderick* v. *Rosner*, 294 U. S. 629, 643. There probably is an area within which a state is not compelled to, but may voluntarily give effect to a foreign right of action, as for example, the area in which a state could successfully assert that enforcement is repugnant to its local policy, and the area encompassed by the doctrine of *forum non conveniens*. In passing we note that courts have been loathe to invoke the doctrine of *forum non conveniens*. See *Weed* v. *Smith*, 15 N. J. Super. 250; *James H. Rhodes & Co.* v. *Chausovsky*, 137 N. J. L. 459; *In Re Fischer*, 119 N. J. Eq. 217.

The significant fact is that, in the areas just described, what is involved is enforcement of a foreign right of action. If under comity, enforcement is granted, the right is simply that created by foreign law. If enforcement is

denied, the right remains undiminished and is enforceable where the right was created. But here we are not dealing with the enforcement of a foreign right of action. Rather we are dealing with a right of action created by the law of the forum. A denial of that right deprives the litigant of it everywhere. Hence the result of the denial is to single out a group of persons who are treated differently from all others in that substantive aspect.

Such denial is not compensated by recognition of any substituted right of plaintiffs against defendants. The New York statute substitutes the compensation remedy for the employee's common law remedy against the employer, but it gives the employee no substituted right against a negligent person in the same employ. The employee's remedy against the employer in New York is the same whoever the tortfeasor may be.

We know of no case, and doubt that any exists in which "comity" has been held to justify a denial of a right to relief with respect to a cause of action arising under the law of the forum, which would leave the victim without remedy against the tortfeasor. See: *Bogen* v. *Bogen*, 219 N. C. 51, 12 S. E. (2d) 649; *Forbes* v. *Forbes*, 226 Wis. 477, 277 N. W. 112; *Bourestom* v. *Bourestom*, 231 Wis. 666, 285 N. W. 426, and 146 A. L. R. 705, 108 A. L. R. 1410.

Harber v. *Graham*, 105 N. J. L. 213 and *Masci* v. *Young*, 109 N. J. L. 453 did not hold that because New Jersey citizens were transients in Massachusetts and New York respectively, those jurisdictions had no concern with the result and hence New Jersey Law should be applied to them. Nor did New York take that view in *Cherwein* v. *Geiter*, 272 N. Y. 165, 5 N. E. (2d) 185, or in *Fisher* v. *Fisher*, 250 N. Y. 313, 165 N. E. 460 or in *Van Voorhis* v. *Brintnall*, 86 N. Y. 18, which involved the converse of the present case. The concept that a jurisdiction in which

a cause of action arises will apply, as to foreigners, the law of their nation, obtains in some European systems, but never took root in the United States.

The result here reached cannot be reconciled with the inevitable scope of the Full Faith and Credit Clause. Suppose plaintiffs sued defendants in New York. There can be no doubt that the clause operates with respect to decisional law as well as statutes, *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430; *Aetna Life Ins. Co.* v. *Dunkin*, 266 U. S. 389, 393; Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1 at 12, and hence the New Jersey common law right of action would come within the protection of the clause. On what basis could New York decline to enforce that cause of action? It could not urge that section 29(6) operated *sua sponte*, in New Jersey, because a state lacks constitutional power to legislate as to events beyond its borders. *Magnolia Petroleum Co.* v. *Hunt, supra.* Whereas as between employee and employer, its police power justifies a substituted right of action as to foreign accident, yet since the New York statutes give no substituted right against fellow-employee, New York's refusal could amount only to the untenable proposition that it can obliterate foreign rights by giving extraterritoriality to its statute. The only other possible avenue would be that the enforcement of the New Jersey cause of action is obnoxious to its public policy. Although New York holds that its substituted compensation remedy will be enforced as between employer and employee, it has never held that section 29(6), which destroys a common law right without a substituted remedy against the tortfeasor, was intended to apply to accidents outside New York. New York has never so construed its law. But if New York did assert its local public policy, that position would be unsound, be-

cause New York does permit negligence actions, and even between persons who are fellow-employees in certain situations. In such circumstances, the Federal Supreme Court has denied the validity of the excuse that enforcement conflicts with local public policy. *Hughes* v. *Fetter,* 341 U. S. 609; *First National Bank of Chicago* v. *United Air Lines, Inc.,* 342 U. S. 396; *Broderick* v. *Rosner,* 294 U. S. 629.

We do not suggest that New York would hesitate to enforce the New Jersey cause of action. New York says that "A right of action is property" and rejects the notion that comity is "a discretion unregulated by general principles". *Loucks* v. *Standard Oil Co. of New York,* 224 N. Y. 99, 120 N. E. 198. New York has strongly recognized its duty to enforce rights acquired by its citizens in another jurisdiction, even though the New York statute forbids their acquisition in New York. *Fisher* v. *Fisher, supra,* and *Van Voorhis* v. *Brintnall, supra.*

It should be noted that in *Bradford Electric Light Co., Inc.* v. *Clapper,* 286 U. S. 145, the denial of a common law remedy against the employer-tortfeasor did not leave the plaintiff without a right against that tortfeasor; a substituted right was provided by the law of Vermont. Assuming that that case is still authoritative on its own facts, still it would not support a denial of a right under New Hampshire law if Vermont gave no substituted right. We have pointed out that New York gives no substituted right of action against the negligent fellow employee. Section 29(6) simply destroys a common law cause of action.

Hence we have this anomaly: that New Jersey, without any findings necessary to the operation of the Full Faith and Credit Clause, has reached a result with respect to a right of action created in New Jersey, precisely contrary to the result which New York would be compelled to give

by the Federal Constitution. Surely "comity" is not paramount to the Federal Constitution and, indeed, to the very constitutional provision which embodies the doctrine of comity.

We are a mobile nation. If every man carries the law of his home state in his pant's pocket, the confusion in litigation would be prostrating. We would become embroiled in an endless investigation of laws of other states, their scope, application, the issue of their intended extra-territoriality, what the other states would do for us if the situation were reversed, etc. We think it obvious that the existing rules of international law, embodied in conflicts of law, represents the reasoned solution of the same fundamental problems raised centuries ago when events were free of the complexity consequent upon modern travel. Present-day complexity calls for a studied adherence to those principles, rather than their emasculation.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 680.

JACK H. STACY,
Petitioner,

vs.

DAVID GREENBERG and CHARLES MELTZER,
Respondents.

ALVIN WOLFF,
Petitioner,

vs.

DAVID GREENBERG and CHARLES MELTZER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS' ANSWERING BRIEF.

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RESPONDENTS' ANSWERING BRIEF.

Synopsis of Petitioners' Brief.

It is said that New Jersey violated the Privileges and Immunities Clause, the Due Process Clause, the Equal Protection Clause, and the Full Faith and Credit Clause.

Seriatim, the facts are:

1. New Jersey honored the domiciliary immunity from common law suits by co-employees in the course of employment.

2. New Jersey accorded the processes of its courts to petitioners over a four year period, through two trial court and three appellate proceedings.

3. New Jersey gave the protection of its courts to the defendants in granting them the immunity to which the plaintiffs had agreed, but sought to avoid.

4. Petitioners assert that New Jersey should have followed the "New York Law of Torts" as determinative of a New Jersey mishap. *Broderick* vs. *Rosner*, 294 U. S. 629, is advanced as their authority. It is authority, by this Court, that New Jersey must honor contractual obligations made in New York, and New Jersey did just that in this matter.

In short, petitioners here claim a constitutional guarantee of verdicts in their favor, even though they, in return for a like immunity had they become defendants, had granted immunity to these respondents.

1.

New Jersey in upholding immunities from common law suits between co-employees in the course of their employment, established by Sec. 29(6) of the New York Compensation Law, acted in accordance with the United States Constitution.

The above is the sole question here involved, no matter how many sections of the Constitution may be argumentatively advanced.

While this petition, based by stipulation proffered by the petitioner, on the pleadings and two New Jersey Su-

preme Court opinions, should be free of factual dispute, it is necessary to correct two statments in petitioner's brief.

In paragraph 3, page 2, it is said: "The automobile was the personal property of Meltzer, occasionally used on business trips by him, for his convenience."

The record, page 15, line 14:

> "Its (the employers) executives and key employees frequently make the trip from New York to Nazareth on matters concerned with this business. They may travel by means of their choice, but often drive, and not infrequently in the Cadillac convertible, registered in Meltzer's name but purchased by the corporation and maintained and garaged at its expense."

On page 3, top, petitioners in their brief say the first appeal was on the "sole ground (of) the full faith and credit clause", and that the "New Jersey Supreme Court reversed on a different ground, stating that as a matter of 'comity', New Jersey would apply New York law".

The full record of the first appeal is not before this Court. It seems to us it should be if factual statements are to be made, or conclusions not stated by the Courts below are to be drawn. Petitioners present counsel was not in the prior proceedings, which perhaps explains the errors. But respondents counsel was not only in all the prior proceedings herein, but was plaintiff's counsel in *Zurich* vs. *Ackerman Bros.*, 124 N. J. L. 187 (E. & A., 1940), upon which the comity decision complained of was based (Record, p. 11, line 8), and can therefore state beyond possibility of contradiction that the comity defense and the

Zurich, etc., holding were presented both in the brief and the oral argument of the first appeal.

And the *Zurich* case was largely based on *Loucks* vs. *Standard Oil Co.*, 224 N. Y. 99, in which Judge Cardozo said:

> "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. * * * The misleading word 'comity' has been responsible for much of the trouble. The Courts are not free to refuse to enforce a foreign right at the pleasure of the Judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal.
>
> "The test of similarity has been abandoned there" (Mass.). "If it has ever been accepted here, we think it should be abandoned now".

Petitioners say that *Loucks* vs. *Standard Oil* is in their favor (Pb8), and would undoubtedly have assured their success had they filed their suit in New York. Why they sought a foreign forum in preference to a much more convenient one where all concerned lived and worked, a forum clearly more conversant with the statute in question, they do not explain. New York had clearly stated the type of co-employee cases involving injury by automobile to which Sec. 29(6) was inapplicable, and New Jersey analysed and followed them (Record, pp. 17-18). All this could have been done in New York, more conveniently, more economically, and, considering the use of affidavits on the motion to strike the defense in New Jersey, we think more expeditiously (Record, p. 13, par. 2).

The thrice-repeated criticism of *Bradford Electric Co.* vs. *Clapper*, 286 U. S. 145 (Pb5, 11, 18), and the contention that *Pacific Employers* vs. *Industrial Accident Commission*, 306 U. S. 493, overrules, or severely limits it, we deem unfounded. In the 1951 case of *Hughes* vs. *Fetter*, 341 U. S. 609 at 615, Mr. Justice Frankfurter said:

> "In the field of commercial law, where certainty is of high importance" * * * "we held that New Jersey could not close its courts to suits which involved stockholder liability arising under the laws of New York" (*Broderick* vs. *Rosner, supra*). On page 616, "In cases involving workmen's compensation, there is also a pre-existing relationship between the employer and employee that makes certainty of result desirable".

(We interpolate "between co-employees" as equally pertinent.)

He quoted the limitation on *Bradford* vs. *Clapper, supra*, as imposed in *Alaska Packers* vs. *Industrial Acc. Comm.*, 294 U. S. 532, as pronounced by Mr. Justice Stone in *Pacific Employers* vs. *Industrial Acc. Comm.*, thus:

> "The Clapper case cannot be said to have decided more than that a State statute applicable to employer and employee within the State, which by its terms provides compensation while he is injured while temporarily in another State, will be given full faith and credit when not obnoxious to its policy".

This is a later pronouncement of the rule previously announced in *Loucks* vs. *Standard Oil, supra*, and the question of public policy in New Jersey was settled in *Zurich* vs. *Ackerman Bros., supra.*

That all these Federal questions, as decided by the Federal cases herein cited, were considered and approved by the New Jersey Supreme Court in the first appeal in this case, is clearly shown by the Record herein, from the center of page 10 to the center of page 13. The rule above enunciated was repeated from the Restatement, thus:

> "If the Compensation Act of the State where the contract is made abolishes the common law or statutory right either as a result of the fact that the employment was entered into in that State or by reason of the election of the parties to come within the operation of that Act, no action can be maintained in any State irrespective of where the workman was injured or killed unless the State where the wrong occurred has declared the Act obnoxious to its policy of permitting recovery for the protection of the interests of persons living in the State. This result is required as between States of the United States under the full faith and credit clause of the Constitution".

Can there be any doubt that when New York, in Section 29(6) of its Workmen's Compensation Act, said

> "The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee, or in case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ",

that it abolished the common law right of an action at law in negligence as between co-employees in the course of employment, which the parties herein were held to be?

Can there be any doubt that New Jersey held in *Zurich* vs. *Ackerman Bros.* that Section 29, (in that case (5) was in issue), was not obnoxious to New Jersey policy?

Of course there can be no doubt in view of the unmistakable language used,

> "Under our interpretation of the New York Statute we come finally to the doctrine of state comity. The rule is that where the laws of a foreign state do not conflict with the public policy of this state, it is our duty to recognize and enforce the laws of said state".

At page 15 of their brief, plaintiffs observe that "The Full Faith and Credit Clause parallels the international law of comity". Accurate, certainly, but inadequate, as the full faith and credit clause also parallels the interstate law of comity.

They also accurately state that "Its purpose was to make mandatory principles which otherwise would be free of constitutional compulsion", and again quote *Broderick* vs. *Rosner, supra.* They seem to be in agreement with our major premise, which is, that regardless of whether the result herein be labeled comity or full faith and credit, the effect is identical, i. e., the foreign law, not inconsonant with the local policy, is enforced. The good neighbor principle triumphs over semantic niceties.

We believe that our brief could well end here, but in an abundance, perhaps a superabundance, of caution, we add a number of excerpts supportive of our position.

By substituting "New York" for "Vermont", and "New Jersey" for "New Hampshire", the otherwise exact language of *Bradford Electric* vs. *Clapper, supra,* could be used as the language of the opinion herein; where "employer" is used, add "or co-employee", as added in New York:

At page 153: "It clearly was the purpose of the New York Act to preclude any recovery by proceedings brought in another State for injuries received in the course of a New York employment. The provisions of the act leave no room for construction. * * * If the accident had happened in New York, the statute plainly would have precluded the bringing of an action for damages in New Jersey. For such action is predicated on a tort; and in New York an injury from the employers negligence is not a tort, if the provisions of the Compensation Act have been accepted. The question is whether the fact that the injury occurred in New Jersey leaves the courts free to subject the employer to liability as for a tort. That is, may the New Jersey courts disregard the relative rights of the parties as determined by the law of New York, where they resided and made the contract of employment; or must they give effect to the New York act, and to the agreement implied therefrom, that the only right of the employee against the employer, in case of injury, shall be the claim for compensation provided by the statute?"

The "extra-territorial effect" objection raised by petitioners herein, was disposed of in *Bradford* vs. *Clapper*, thus:

At page 156: "But, obviously, the power of Vermont to effect the legal consequences by legislation is not limited strictly to occurrences within its borders. It has power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders * * * and likewise has power to exclude from its own courts, proceedings for any other form of relief for such injuries". (P. 158), "The mere recognition by the courts of one State that parties by their conduct

have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extra-territorial application of the law of the State creating the obligation".

This principle was followed in *Broderick* vs. *Rosner* in holding that "since the New Jersey courts possess general jurisdiction of the subject matter and the parties", the full faith and credit clause required enforcement of the foreign contracts.

What is overlooked by those who contend that the Alaska Packers and Pacific Employers cases overrule *Bradford Electric* vs. *Clapper,* is that California policy was emphatically to the effect that "No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this Act".

Quite the opposite was held in New Jersey, at least since 1940, when *Zurich* v. *Ackerman Bros.* was decided in its highest court.

We beg to quote in closing the words of Mr. Justice Brennan, speaking for New Jersey's highest Court, in 1952, from the Record, page 10, as our

Conclusion.

"Nothing is presented in this situation which is obnoxious to the public policy of New Jersey. Recognition of the limitation upon plaintiff's rights of suit against fellow servants imposed by the New York statute can in no wise be prejudicial to the interests of our State. By making the New York statute the applicable law in the instant cases we merely recognize that by their conduct plaintiffs have subjected themselves to certain restrictions

upon their rights to pursue remedies against their fellow servants incorporated by the New York law into their contracts of employment. These are substantial provisions of such contracts and create in employers and fellow employees rights of immunity from suit, and should be enforced by us when not contrary to our public policy."

Respectfully submitted,

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